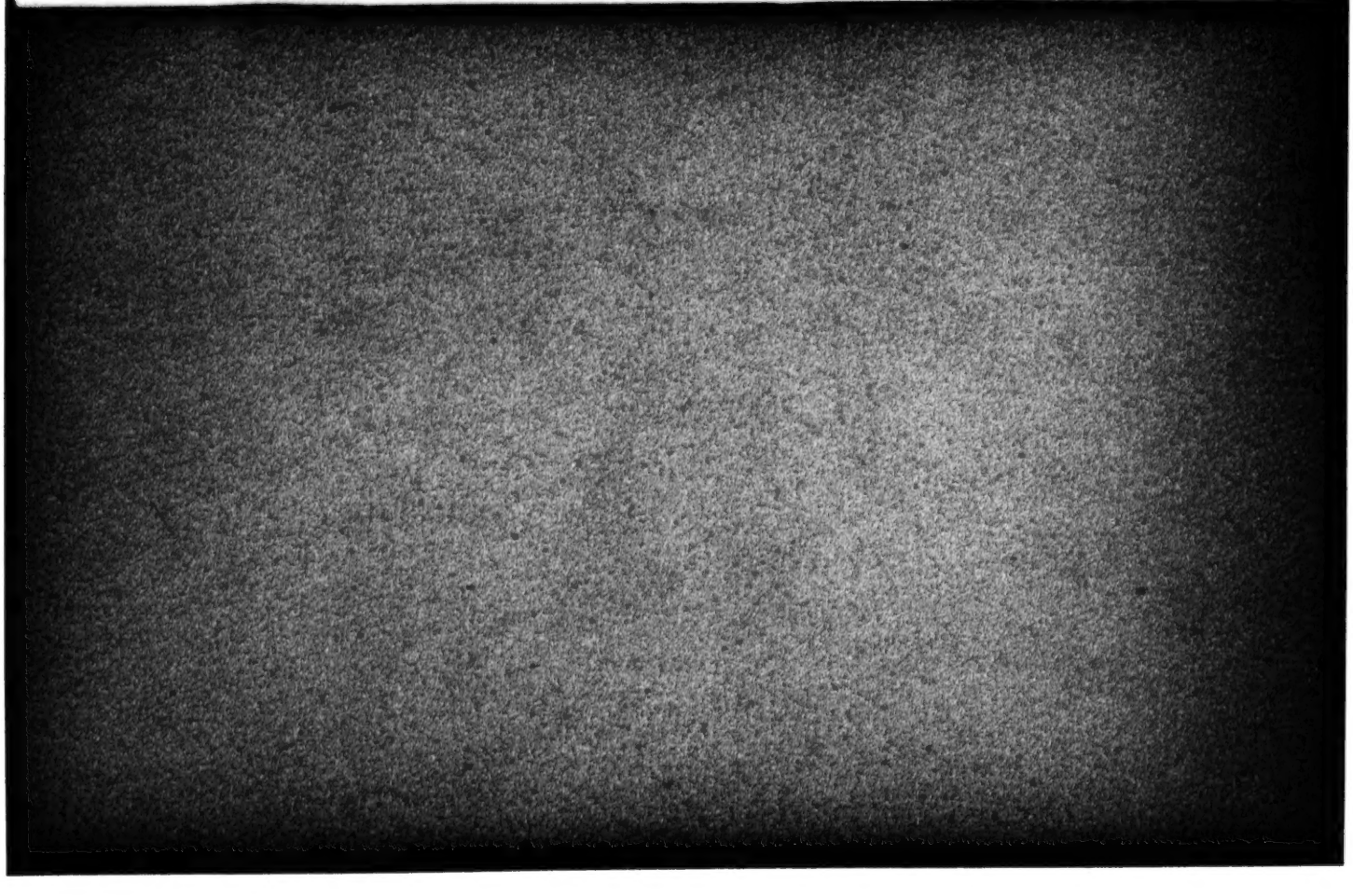

NO. 73-604, NO. 73-5661

In the

Supreme Court of the United States

OCTOBER TERM, 1973

DONALD C. CASS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

FRANCIS A. ADAMS, ROBERT J. STENEMAN, MICHAEL W. YOUNGQUIST,

Petitioners,

vs.

SECRETARY OF THE NAVY, et al.,

Respondents.

BRIEF OF JOHN N. O'MEARA, AMICUS CURIAE

KEVIN M. FORDE
111 W. Washington Street
Chicago, Illinois 60602

ROGER J. KILEY, JR.
EDWARD T. JOYCE
77 West Washington Street
Chicago, Illinois 60602
Attorneys for Amicus Curiae

The Scheffer Press, Inc.—(312) 263-6850

INDEX

TABLE OF AUTHORITIES

CASES

PAGE

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

NO. 73-604, NO. 73-5661

DONALD C. CASS,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

FRANCIS A. ADAMS, ROBERT J. STENEMAN, MICHAEL W. YOUNGQUIST,
Petitioners,
vs.
SECRETARY OF THE NAVY, et al.,
Respondents.

BRIEF OF JOHN N. O'MEARA, AMICUS CURIAE

INTEREST OF AMICUS

The parties to these consolidated cases have all consented to the submission by John N. O'Meara ("O'Meara") of an amicus curiae brief.[1] O'Meara is plaintiff-appellee

[1] O'Meara has filed with the clerk letters from counsel for all parties expressing their consent.

in a case now pending in the United States Court of Appeals, Seventh Circuit, in which the principal issue is identical to that before the Court in this case. *O'Meara v. United States of America,* (C.A. 7, No. 73-1802).

As a member of the United States Marine Corps Reserve, O'Meara filed a complaint for readjustment pay under 10 U.S.C. § 687(a) against the United States of America ("United States") in the United States District Court, Northern District of Illinois, Eastern Division. He brought that action on his own behalf and, pursuant to Rule 23, Federal Rules of Civil Procedure, as a class action. The United States moved to Dismiss O'Meara's complaint on the ground that O'Meara's four years, eleven months and seventeen days of active duty did not satisfy the "five year" eligibility requirement of 10 U.S.C. §687 (a). The District Court denied that motion and in its memorandum opinion ruled that the definition of year in subsection (a) ". . . a part of a year that is six months or more is counted as a whole year . . .", by its terms is applicable to O'Meara's fractional year service making his total active duty five years and that he thus satisfied the five year eligibility requirement.

O'Meara then moved the District Court for an order that the cause be designated and maintained as a class action pursuant to Rule 23, Federal Rules of Civil Procedure. The Court granted O'Meara's motion.

The United States took an appeal to the United States Court of Appeals, Seventh Circuit, from these two interlocutory orders which the District Court had certified pursuant to 28 U.S.C. §1292(b). The principle issue before the Court of Appeals is precisely the same issue as that before the Court in this case, viz., the applicability of the definition of "year" in 10 U.S.C. §687(a).

Both parties have filed their respective briefs with the Clerk of the Court of Appeals, Ninth Circuit, but the Court is holding oral argument in abeyance pending decision of the Supreme Court in this case.

O'Meara is anxious to contribute to full consideration of the case before the Court and submits his brief to aid the Court in resolving the issue before it.

SUMMARY OF ARGUMENT

This case involves exclusively the interpretation of 10 U.S.C. §687(a). Specifically, the question is whether the definition of "year" appearing in subsection (a) applies to the subsection for all purposes where the word "year" appears or applies to the subsection for one purpose only, to compute the amount of statutory benefits. The definition in subsection (a) reads that ". . . a part of a year that is six months or more is counted as a whole year. . . ". It is immediately preceded by the exegetical phrase, "For the purposes of this subsection". The word "year" appears in subsection (a) both in the eligibility statement and in the formula for computing benefits.

This Court is asked to determine whether the Court of Appeals, Ninth Circuit, was correct when it found that the definition of year applied to subsection (a) for only one purpose, to determine amounts of benefits, not to determine eligibility, and that, therefore, petitioner's four years, nine months and thirteen days of active duty did not satisfy the five year eligibility requirement.

In the view of the Amicus, the judgment of the Court below was incorrect. Eleven federal courts at various levels have considered the precise issue before the Court. All but one, the Court below, have held that the defini-

tion of "year" contained in subsection (a) of Section 687 applies to the subsection for all purposes and without limitation.

The Amicus contends first, that subsection (a) of Section 687 is clear and unambiguous, and is susceptible of only one interpretation, that its definition of year as any part of a year "six months or more" is applicable to determine eligibility under subsection (a). The definition in subsection (a) by its clear terms applies to the subsection without limitation for the phrase which precedes it states that definition applies "For the purposes of this subsection".

The respondent, however, contends that the subsection's eligibility requirement of "five years . . . active duty" is clear and that nothing short of five full years satisfies the statute's eligibility requirement. This contention wholly ignores and reads out of subsection (a) the clear definition of year as any part of a year "six months or more" and the exegitical phrase that the definition applies "For the purposes of the subsection."

The respondent also and alternatively contends that there is ambiguity in subsection (a), that resort to legislative history is therefore appropriate and that legislative history is clear that the definition of "year" does not apply to determine eligibility.

The purported ambiguity upon which the respondent exclusively relies to justify resort to legislative history does not exist. The conflict creating the ambiguity purportedly lies in the conflict between the statement of eligibility, five years active duty, and the definition of "year" being any part of year "six months or more". Applying the definition to the eligibility statement, what is

expressed to be five years becomes four years-six months. That is a conflict, contends the respondent, because it is circuitous and without apparent reason.

Amicus contends that subsection (a) is clear of ambiguity and that any assertion that Congress may have been circuitous without apparent reason, albeit clear, wholly fails to justify resort to legislative history. The use of the word "year" as statutorily defined in the eligibility statement is consistent with the fundamental purpose of the subsection which is to provide benefits to reservists who volunteer for continued active duty but are denied that opportunity.

Respondent actually finds ambiguity, not in the language of 10 U.S.C. §687(a) but in its legislative history. Amicus contends that subsection (a) being free of ambiguity, must be read as it is written and that legislative history cannot be used to create an ambiguity which does not appear on the statute's face.

Respondent first points to the precessor to subsection (a) which clearly limited the definition of "year" to computation of benefits, "For the purposes of computing the amount of readjustment pay . . ." and asserts that the substitution in the present subsection of the words "For the purposes of this subsection" really was not intended by Congress to change the meaning expressed in the repealed subsection. Respondent finds evidence of this intent not on the face of the statute but in a Senate report which expressed generally that the new bill was not intended to make any substantive change.

Amicus contends that if a statute's clear terms change the substance of its predecessor, even if inadvertent, the clear terms must prevail.

The Respondent contends that the subsection was changed as the result of a codification and that therefore even if it clearly made a change in substance, it must be read as though no change was made. Amicus contends no such principle of law exists and that if a statute's terms are free of ambiguity, they must be followed without resort to legislative history.

Amicus finally contends, but for argument purposes only, that even if an ambiguity in the statute exists, the legislative history does not solve it. The difference between subsection (a) as it is now written and as it was written previously clearly indicates an intention to effectuate the application of the definition of year to subsection without limitation. The Senate report's generalized statement that no change in substance was intended is not sufficient to overcome the clear intent manifested in the comparison between the language of the old and the present statute. This is especially so in light of the "fact" that the old bill originally read precisely as the statute now reads but was changed because of the expressed fear of the Comptroller General that it could be construed as requiring only four years six months for eligibility.

The decision of the Court below should be reversed and the decisions of the District Courts affirmed because of the manifestly clear language of the statute in question. The Respondent perceives the language change to be inadvertent and engages in legal alchemy to find justification for its resort to legislative history, which at best creates rather than solves an ambiguity. The application of the definition of "year" without limitation to subsection (a) is clear and must prevail.

ARGUMENT

I. THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN ITS INTERPRETATION OF 10 U.S.C. §687(a); THEREFORE, ITS DECISION MUST BE REVERSED AND THE DECISIONS OF THE DISTRICT COURTS AFFIRMED.

A. Cass' Four Years, Nine Months And Thirteen Days Of Active Duty In The United States Army Qualifies Him For Benefits Under 10 U.S.C. §687(a).

This appeal from the United States Court of Appeals, Ninth Circuit raises only one fundamental issue, whether Cass' four years, nine months and thirteen days satisfies the five year eligibility requirement of 10 U.S.C. §687 (a).

In pertinent part subsection (a) provides:

> ". . . a member of a reserve component . . . who . . . was not accepted for an additional tour of active duty . . . and who, immediately prior to his release, has completed, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service . . . by two months' basic pay . . . For the purposes of this subsection—
>
> • • •
>
> . . . a part of a year that is six months or more is counted as a whole year, and a part of a year less than six months is disregarded."

The Court of Appeals, Ninth Circuit, held that the definition of "year" just quoted, which reads ". . . (f)or purposes of this subsection . . . a part of a year that is six months or more is counted as a whole year . . .", applies to subsection (a) for only one purpose, to compute the actual amount of readjustment benefits, not for

the purpose of determining eligibility, and that Cass thus failed to qualify for the statutory benefits. *Cass* v. *United States,* 483 F.2d 220 (1973).

The decision of the Court of Appeals in *Cass* conflicts with the decisions of every other court which has considered the issue. The first court to consider the question was the Court of Claims in *Schmid* v. *United States,* 436 F. 2d 987 (Ct. Cls., 1971), *cert. denied* 404 U.S. 951 (1971). The Court ruled that subsection (a) of Section 687 ". . . is clear and unambiguous on its face and is subsceptible, on its face, of only one interpretation . . .", that the phrase "(f) for the purposes of this subsection . . ." compels application of the definition of year, "a part of a year that is six months or more", to subsection (a) for all purposes, including to determine eligibility. 436 F. 2d at 989. Applying the definition of year for eligibility purposes, the Court counted Schmid's four years, six months and twenty-seven days of active duty as five years and ruled that he satisfied the subsection's five year eligibility requirement. 436 F.2d at 991.

The United States, in *Schmid,* unsuccessfully argued that the legislative history of subsection (a) of Section 687 clearly establishes that nothing short of five full years of active duty is required as a condition of eligibility and that despite the introductory phrase ". . . [f]or the purposes of this subsection. . .", the definition of year is applicable to the subsection, not to determine eligibility, but for only one purpose, to compute the amount of benefits. The United States argued that, although Congress admittedly discarded the plain language of the predecessor to subsection (a)[2] which clearly

[2] The Act of July 9, 1956, ch. 534, §265, 70 Stat. 517.

limited the application of the definition of year to the subsection for one purpose, "[f]or the purposes of computing the amount of readjustment payment. . .", and substituted in its place the language of the present subsection (a) which has no such limitation, "[f]or the purposes of this subsection. . .", Congress really did not intend to do what it did, i.e., change the language of subsection (a). Congress, the United States contended, really intended the definition of year to be applicable only "for purposes of computing the readjustment payment" even though the subsection reads "[f]or the purposes of this subsection". The United States referred the Court to the Senate report which accompanied the bill which became 10 U.S.C. §687. The report expressed that "this bill . . . is not intended to make any substantive change in existing law. . .".

The Court, in *Schmid,* rejected the United States arguments because it found no ambiguity whatever in the language of subsection (a). The Court found that the subsection clearly defines the term year as ". . . a part of a year that is six months or more. . .", that on its face, that definition is plainly without limitation in its application to subsection (a), and that it therefore clearly applies to the subsection to count the years for purposes of determining eligibility for readjustment benefits.

Moreover, the Court determined that the legislative history indicated that the intent of Congress was in accord with the subsection's plain meaning, or that at most, the legislative history was not so clear and compelling as to require an interpretation inconsistent with the subsection's clear terms. First, the Court pointed to the admitted change in the language between subsection (a) and its predecessor, (i.e., the discarding of the clear

limitation in the application of the definition of year to the subsection for only one purpose, and the substituting of equally clear language making the definition apply to the subsection without limitation). And this clear and obvious change in the language, the Court ruled, cannot be set aside because of a general statement of purpose appearing in a Senate report. 436 F.2d at 990.

The next Court to consider the precise issue on appeal here was the District Court in *Cass* v. *United States*, 344 F. Supp. 550 (1973). There, the District Court of Montana, Helena Division decided, as in *Schmid*, that the language of subsection (a), ". . . (f)or the purposes of this subsection . . . a part of a year that is six months or more is counted as a whole year. . ." clearly and unambiguously applies to subsection (a) for the purpose of determining eligibility, and that Cass' four years, nine months and thirteen days of active duty counts as five years to satisfy the subsection's five year eligibility requirement. 344 F. Supp. at 551. This decision was reversed by the Court of Appeals, Ninth Circuit in *Cass* and that decision is now before the Court.

The United States District Court, Central District of California, in three unpublished decisions, also decided the same issue precisely as did the Court of Claims in *Schmid* and the District Court in *Cass*, and counted parts of a year "six months or more" as a whole year to determine that the subsection's five year eligibility requirement had been met. *Adams* v. *Secretary of the Navy*, (C.A. 9, No. 73-3028); *Steneman* v. *United States*, (C.A. 9, No. 73-3029); *Youngquist* v. *United States* (C.A. 9, No. 73-3030).[3]

---

[3] O'Meara is unable to locate the District Court numbers; the numbers here cited are the numbers of the United States Court of Appeals, Ninth Circuit.

These District Court decisions, having been consolidated on appeal with *Cass*, were reversed by the decision of the United States Court of Appeals, Ninth Circuit now before this Court.

The United States District Court, Northern District of Illinois, Eastern Division, next considered the issue, deciding that the definition of "year" in subsection (a) applied to the subsection for all purposes including to determine eligibility under 10 U.S.C. §687(a) and ruling that O'Meara's four years, eleven months and seventeen days satisfied the subsection's five year eligibility requirement. *O'Meara* v. *United States*, 59 F.R.D. 560 (D.C. N.D. Ill., (1973)). This decision has been and is pending before the United States Court of Appeals, Seventh Circuit (C.A. 7, No. 73-1802).[4]

The Court of Claims in *Campbell* v. *United States*, 200 Ct. Cl. 742 (1973) and the District Court, Central District, California, in *Krane* v. *Secretary of the Navy* (C.D. Cal., Civil No. 72-2859FW), *Reid* v. *Secretary of the Navy* (C.D Cal., Civil No. 72-1789FW), and *Fimani* v. *Secretary of the Navy* (C.D. Cal., Civil No. 72-2201-LTL) have all likewise held that the definition of "year" in subsection (a) applies to the subsection both for the purpose of determining eligibility as well as for the purpose of computing the amount of benefits.

The question before this Court therefore is clear. Does the definition of "year" in subsection (a), ". . . a part of a year six months or more is counted as a whole year . . .", which by its terms applies ". . . (f)or the purposes of this subsection . . ." apply to subsection (a) for the purposes both of determining eligibility as well as the

[4] The Court has held oral argument in abeyance pending decision of this Court in *Cass*.

amount of statutory benefits. Or does it apply to the subsection for only one purpose, to determine the amount of the benefits. O'Meara submits that the definition of "year" applies to subsection (a) for all purposes including eligibility and that therefore the decision of the Court of Appeals in *Cass* must be reversed and the District Courts affirmed.

1. The Language Of Subsection (a) Of Section 687 Is Clear And Unambiguous.

The language of subsection (a) is clear and unambiguous. On its face, it is susceptible of only one interpretation, that the definition of "year" in subsection (a) applies to the subsection without limitation and that therefore it applies for purposes of determining eligibility. It is the duty of this Court, therefore, to enforce the subsection as it is clearly written and to reverse the decision of the Court of Appeals in *Cass. Caminetti* v. *United States,* 242 U.S. 470, 490 (1917); *United States* v. *Standard Brewery,* 251 U.S. 210, 219 (1920); *United States* v. *Schreveport Grain & Elevator Co.,* 287 U.S. 77 (1932); *Helvering* v. *City Bank Company,* 296 U.S. 85 (1935); *Sixty Two Cases, etc.* v. *United States,* 340 U.S. 593 (1951); *Durkee Famous Foods* v. *Harrison,* 136 F. 2d 303 (7th Cir. 1943); *De Soto Securities Company* v. *Commissioner of Internal Revenue,* 235 F. 2d 409 (7th Cir. 1956); *Wirtz* v. *Local 191, Int'l. Brotherhood of Teamsters, et al.,* 321 F. 2d 445 (2nd Cir. 1963); *General Electric Company* v. *Southern Construction Co.,* 383 F. 2d 135 (5th Cir. 1967), *cert. denied* 390 U.S. 955 (1967); *Arkansas Valley Industries, Inc.* v. *Freeman,* 415 F. 2d 713 (8th Cir. 1969).

In pertinent part, subsection (a) of Section 687[3] provides:

> "(a) [A] member of a reserve component or a member of the Army or the Air Force without component who is released from active duty involuntarily, or because he was not accepted for an additional tour of active duty for which he volunteered after he had completed a tour of active duty, and who has completed, immediately prior to his release, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service (other than in time of war or national emergency . . .), but not more than eighteen, by two months' basic pay of the grade in which he is serving at the time of his release. . . . For the purposes of this subsection—
>
> (1) a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days;
>
> (2) a part of year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded; and . . ."

Subsection (a) clearly defines the word "year" to mean any ". . . . part of a year that is six months or more . . .". And that definition is clearly applicable to subsection (a) without limitation wherever the word year appears, for by its terms, the definition applies ". . . [f]or the purposes of this subsection . . .".

The word "year" appears twice in subsection (a), in the statement of years of active duty required for eligibility, ". . . . at least five *years* . . .", and in the formula for computing the amount of readjustment benefits,

---

[3] O'Meara has attached the full text of §687(a) as an Addendum to his Brief.

". . . multiplying his *years* of active service . . . by two months' basic pay . . .". Because the definition of year, by its terms, clearly applies without limitation to subsection (a). ". . . a part of a year that is six months or more is counted as a whole year. . ." both for the purpose of determining whether the five year active duty eligibility requirement has been met and for the purpose of computing the amount of readjustment benefit. Consequently, the clear and unambiguous language of subsection (a) mandates that *Cass'* four years, nine months and thirteen days of active duty be counted as five years for both purposes thereby satisfying subsection (a)'s five year active duty eligibility requirement.

The United States has admitted in these cases that the language of subsection (a) is clear and unambiguous, but argues that it clearly and unambiguously requires as a condition of eligibility, nothing short of five full years of active duty. Quoting the subsection's eligibility statement of ". . . at least five years of continuous active duty. . .", and relying on the decision of the Court of Appeals in *Cass,* the United States contends that the eligibility period is unequivocal and not modified by any other clauses in the subsection.

O'Meara submits that this argument of the United States must be rejected by the Court. While purporting to say that the subsection is clear on its face, the United States in actuality is urging the Court to read out of subsection (a) the statutory definition of year. While O'Meara agrees with the United States that subsection (a) requires five years of active duty as a condition of eligibility, he does not agree that the word "year" as used in the eligibility statement is undefined in subsection (a). For to contend, as the United States does, that the use of the word "year"

in the statement of eligibility is not modified by any other clause in the subsection, is to ignore not only the clear statutory definition, ". . . a part of a year that is six months or more is counted as a whole year. . .", but also its unambiguous exegetical statement that the definition applies ". . . [f]or the purposes of this subsection. . .". It is this statutory definition of "year", and no other, which must be used by the Court in reading subsection (a). *Thorton* v. *Commissioner of Internal Revenue,* 159 F.2d 578 (7th Cir. 1947). And reading this statutory definition into the subsection's eligibility requirement of ". . . at least five years of continuous active duty. . .", subsection (a) is clear on its face, and on its face is susceptible of only one interpretation, that *Cass'* four years, nine months and thirteen days of active duty is counted as five years and satisfies the eligibility requirement of subsection (a).

But the United States contends, and it is the United States' essential contention in this appeal, that the statutory definition of "year" does not apply to the subsection wherever the work "year" appears. Rather, the United States contends that, despite the definition's introductory phrase, ". . . [f]or the purposes of this subsection. . .", the definition applies to the subsection for only the one purpose, to the use of the word "year" in the formula for computing the amount of benefits, not to its use in the eligibility statement. Although the United States proposes to argue that its contention is supported by the clear terms of subsection (a), the United States is less than serious in advancing that argument. Actually, the United States relies almost exclusively upon selected portions of legislative history rather than on the terms of subsection (a) for support of its contention.

Realizing it must find an ambiguity in the statute before it can make its case with legislative history, the United States will move quickly in its argument from the less than serious contention that the eligibility statement is clear and not modified by any other clause in the subsection, to the contention that the subsection's statement of eligibility conflicts with the subsection's definition of year. It is in this conflict and this conflict alone, that the United States, relying again upon the Court of Appeals in *Cass*, will purport to find the necessary ambiguity as a predicate to its resort to legislative history.

The purported conflict in subsection (a) upon which the United States will rely to justify its almost exclusive resort to legislative history for support of its contention, is really no conflict at all. The statement of eligibility, ". . . at least five years. . .", does not, on its face, conflict with the statutory definition of year ". . . a part of a year that is six months or more". Rather, the statutory definition is read into the word "year" as it is used in the eligibility statement.

The United States relies on the decision of the Court of Appeals in *Cass* to find a "conflict" in the terms of subsection (a). But although the Court in *Cass* used the word "conflict", it was referring to circuity of terms, not conflict, that the subsection, when read as Congress plainly wrote it, is circuitous. The court commented that there is no apparent reason why Congress would choose such a circuitous method of setting the eligibility period. It is from this purported absence of "apparent reasons" for the use of clear, *albiet*, circuitous draftsmanship, that the United States will purport to find the ambiguity which is so vital to its almost exclusive reliance on legislative history to support its contention that Congress did not mean to write what it actually wrote.

O'Meara submits that subsection (a) is free of ambiguity and that any assertion that Congress may have been circuitous without apparent reason when it wrote this clear subsection wholly fails to justify resort to legislative history to create an ambiguity which otherwise does not exist in order to rewrite the statute. The statutory definition of year is clear and its application to the entire subsection, including the eligibility statement, is clear. The use of that word in the eligibility statement as statutorily defined is consistent with the fundamental purpose of the subsection which is to provide a benefit to reservists, like Cass, Adams and O'Meara, who serve on active duty and who subsequently are denied extensions of active duty. In no way does the use of the statutory definition destroy or hinder that purpose. Thus, even though the United States, or the Court, believes the clear terms of the statute to be circuitous, the Court must not superimpose a preferred drafting style and conclude that since Congress did not use the preferred style, it did not mean what it has clearly written. Being free of ambiguity, the clear terms of subsection (a) must prevail. Resort to legislative history under these circumstances must be scrupulously avoided.

2. The Definition Of "Year" In Other Sections Of Title 10, United States Code, Supports The Contention That Subsection (a) Of Section 687 Of Title 10 Is Free Of Ambiguity.

The United States doubtless will refer the Court to other sections of Title 10, United States Code, as supporting its contention that Congress, in writing subsection (a) of Section 687 did not intend to say what is there clearly said. It will be the contention of the United States that the various other sections of Title 10 cited by it contain definitions of "year" which are clearly limited in their ap-

plication to the computation of benefits, not to eligibility, and that the language of those sections evidences the intent of Congress in subsection (a) to limit the statutory definition of year, even though the subsection contains no such limitation.

Putting aside for argument purposes only the principle that the same word used in different sections of the same chapter may have two or more distinct meanings, *Wood, et al.* v. *Dennis,* (C.A. 7, 72-1182), O'Meara submits that these other sections always cited by the United States support his, not the State's position. The Sections which contain definitions of "year" and which are generally referred to by the United States as supporting its position are as follows: 10 U.S.C. 1167 (regular warrant officer severance pay); 10 U.S.C. 1405 (retired pay); 10 U.S.C. 3303, 3786, and 3796 (Army severance pay); 10 U.S.C. 6151, 6328, and 6404 (Navy and Marine Corps retired pay); 10 U.S.C. 8303, 8786, and 8796 (Air Force severance pay); 14 U.S.C. 286 (Coast Guard severance pay); 42 U.S.C. 212 (Public Health Service retired pay); 10 U.S.C. 6330 (transfers to Fleet Reserve). This list contains one Section, 10 U.S.C. §6330, which even the United States admits contains a definition of year which applies both to eligibility as well as to computation of benefits. Apparently it is the United States' contention that because thirteen sections are written one way, and only one is written the other way, that subsection (a) must have been intended by Congress to be read the way most, but not all are written.

This argument defeats itself. The existence of the one section in which the definition of "year" admittedly is read into that section's eligibility statement, totally refutes any contention that the other sections support the interpretation of subsection (a) advanced by the United States here.

If these section have any value, it is only for the proposition asserted by petitioners, not by the United States. 10 U.S.C. §6330, is almost identical to subsection (a) of Section 687. It is a statute which allows a member of the Navy Reserve, assuming he has the requisite years of active duty, to transfer to the Fleet Marine Corps Reserve, and which confers money benefits upon such a transfer. In order to be eligible subsection (b) requires that he have completed ". . .20 or more years of active service. . .". If he meets this eligibility requirement, his benefits, in subsection (c) are computed by multiplying ". . . 2½ percent of the basic pay . . . by the number of years of active service. . .". The word "year", used in both subsection (b) and subsection (c) is defined in subsection (d) as ". . . a part of a year that is six months or more is counted as a whole year. . .". And that definition is prefaced by the phrase, ". . . For the purposes of subsection (b) and (c), . . .".

Subsection (d) of Section 6330 thus contains a definition of year which is identical to that before this Court. Yet, the United States admits the clear applicability of that definition to the eligibility statement in Section 6330, but denies it in the section before this Court. The language is the same, the argument of circuity applies with identical force to both Sections, yet the United States admits Section 6330 is clear and asserts that Section 687 is ambiguous.[6]

---

[6] The list of other sections are distinguishable from the subsection before the Court and from Section 6330. In the other sections, the definition of year obviously does not apply to the eligibility statements because in those sections eligibility is not expressed in terms of years, but rather in terms of events such as denial of promotions.

3. Legislative History Cannot Be Used To Create An Ambiguity In The Clear Language Of Subsection (a).

For all practical purposes the United States relies exclusively upon legislative history to support its contention that the subsection's definition of "year", which by its terms applies without limitation ". . . [f]or the purposes of this subsection. . .", really applies to the subsection for only one purpose. O'Meara submits that the subsection being free of ambiguity must be read as it is written, and that legislative history cannot be used to create an ambiguity or to establish that Congress made a mistake which the Court should now correct. *United States* v. *Schreveport Grain & Elevator Company*, 287 U.S. 77 (1932); *Helvering* v. *City Bank Company*, 296 U.S. 85 (1935); *Aceto Chemical Co.* v. *United States*, 465 F.2d 908 (CCPA 1972); *Arkansas Valley Industries, Inc.* v. *Freeman*, 415 F.2d 713 (1969); *General Electric Co.* v. *Southern Construction Co.*, 383 F.2d 135 (1967); *Durkee Famous Foods* v. *Harrison*, 136 F.2d 303 (1943); and *United States* v. *Zions Savings & Loan*, 313 F.2d 331 (10th Cir. 1963).

The reliance of the United States upon legislative history consists of essentially three arguments. It compares subsection (a) to its predecessors; it analyzes the Senate report accompanying the bill which became subsection (a); and it establishes that the various branches of the armed forces administratively interpret the subsection just as the United States does. A brief analysis of each of these, arguments discloses the essence of the United States' case, that Congress made a mistake when it enacted subsection (a). Although the statute on its face does not disclose any mistake or ambiguity, the United States pur-

ports to find it in the subsection's legislative history. The United States thus attempts to use legislative history to create not to solve ambiguity, and seeks to pursuade the Court to rewrite the statute to correct this purported mistake.

Comparing subsection (a) to its predecessor, the United States points out that in both cases the subsection's statement of eligibility and the definition of "years" are identical, ". . . at least five years of continuous active duty . . ." and ". . . a part of a year that is six months or more is counted as a whole year . . .". However, the United States points out, that the introductory phrase to the subsection's definition of year is plainly different. In the repealed subsection, the phrase read ". . . [f]or the purposes of *computing the amount of readjustment pay. . .*" (emphasis supplied), while in the present subsection it reads ". . . [f]or the purposes of this subsection. . ." . It is this change, which removed language limiting the applicability of the definition of "year" to the subsection for only one purpose and substituted in its place language making the definition applicable to the subsection without limitation, that the United States argues, was unintended.

It was unintended, the United States argues, because the Senate report accompanying the bill which became the present subsection (a) states that no "substantive change" was intended, that the bill's purpose was merely to update and codify Title 10. Furthermore, the United States points out, this Senate report makes no mention of this change in the language, even though the report purports to list the changes to prior laws made by subsection (a).

Finally, the United States represents that all of the branches of the armed services administratively interpret

the definition of "year" in subsection (a) as applying with the limitation expresseed in the repealed subsection, i.e., not to the subsection without limitation whenever the word "year" appears, but rather for only the one purpose of computing the amount of readjustment benefits.

The combined effect of these historical "facts", the United States argues, clearly establishes that Congress did not intend to do what it clearly did in subsection (a), that it did not intend the change it made. And on that basis, the United States, in effect, is asking the Court to excise the introductory phrase of the subsection's definition of "year", ". . . [f]or the purposes of this subsection. . ." and to read into its place, the phrase ". . . [f]or the purposes of computing the amount of readjustment payment. . .".

O'Meara submits that legislative history cannot be used to create, rather than solve, an ambiguity, and that, therefore, the Court must read subsection (a) as it is plainly written, not utilize legislative history to rewrite the subsection's otherwise clear language.

This Court, in *Helvering* v. *City Bank Company*, 296 U.S. 85 (1935), rejected an argument very similar to that made by the United States here. That case involved the construction of Section 302(d) of the Revenue Act of 1926. The question was whether the corpus of a trust was includible in decedent's gross estate for tax purposes. The resolution of the issue depended upon whether the trust reserved the power to revoke, alter or amend the trust. Section 302(d) of the Revenue Act by its clear terms included in gross income the corpus of any trust which reserved such a power to be exercised by the decedent "with any person".

The decedent had reserved such a power in the trust in question. He argued however, that Section 302(d) should be read, not as it was clearly written, but as Section 219(g) of the same title was written. In that section, if the reserved power was to be exercised with one not a beneficiary, then it is not to be included in gross income. Since the decedent's trust reserved a power to be exercised by one who was not a beneficiary under the trust, his representative argued that the corpus should not be included in gross income.

Decedent's representative resorted to legislative history to support his contention that Section 302(d) should be read, not as it was plainly written, but as another section was written. The Report of the Ways and Means Committee on Section 302 (d) stated that "This provision is in accord with the principle of Section 219(g) of the bill which taxes to the Grantor the income of a revocable trust." Refusing to resort to legislative history, this Court stated in pertinent part:

> "The two sections have a cognate purpose but they exhibit a marked difference of substance. The one speaks of a power to be exercised with one not a beneficiary; the other of a power to be exercised with any person. . . It is true the Report of the Ways and Means Committee on Section 302(d) said "this provision is in accord with the principle of Section 219(g) . . .'. But to credit the assertion that the difference in phraseology is without significance and in both sections Congress meant to express the same thought, would be to disregard the clear intent of the phrase 'any person' used in §302(d). We are not at liberty to construe language so plain, as to need no construction, or to refer to Committee reports where there can be no doubt of the words used." 296 U.S. at 89.

The principle expressed in *Helvering* is particularly applicable to reject the argument made here by the United States. In the face of the clear terms of subsection (a) ". . . [f]or the purposes of the subsection . . . a part of a year that is six months is counted as a whole year. . .", the United States urges upon this Court the language of the repealed statute which reads ". . . [f]or the purposes of computing the amount of readjustment payment. . .". And for support for this contention, the United States refers the Court to legislative history, a generalized statement in the Senate report that the bill was not intended to make any changes in substance in the repealed statute.

O'Meara submits that to credit the clear difference in language between the present subsection (a) and the repealed statute as having no substance, is to disregard the phrase ". . . [f]or the purposes of this subsection. . .". *Helvering;* accord., *U.S.* v. *Shreveport Grain & Elevator Co.,* 287 U.S. 77 (1932); *Aceto Chemical Co., Inc.* v. *United States,* 465 F.2d 908 (C.C.P.A., 1972).

The United States Court of Appeals for the Seventh Circuit, in *Durkee Famous Foods* v. *Harrison,* 136 F.2d 303 (7th Cir., 1943), rejected an argument similar to that here made by the United States. In *Durkee,* the United States sought to uphold the imposition of a tax under the Internal Revenue Code by claiming that the words "first domestic processing" really meant "the first domestic processing following the enactment of this act." And in support of its contention, the United States referred the Court to the administrative interpretation of the act in question by the Internal Revenue Service, which was in accord with the meaning urged upon the Court by the United States.

In refusing to adopt the United States' argument the court stated:

> "We think here there is no room for legitimate argument but that a literal reading of the language employed by Congress supports plaintiff's position. It is difficult to conceive of plainer language than the 'first domestic processing'. According to the government first means second or third or fourth. If Congress intended first after the effective date of this act, it could have easily so stated. Not only did if fail to do this, but it later in the same section defined the term 'first domestic processing' as meaning the 'first use in the United States'. Certainly the 'first use' took place with the 'first processing', which in the instant case was prior to the effective date of the act." 136 F.2d at 307.

Just as "first domestic processing", clearly defined in the statute in *Durkee* as the "first use in the United States", prevailed over efforts of the United States to rewrite the statute using legislative history, so also the word "year" in the eligibility statement of subsection (a), clearly defined as ". . . a part of a year that is six months or more. . .", must prevail here against the United States' effort to rewrite the subsection using legislative history. *Durkee;* accord., *United States* v. *Zions Savings & Loan Association,* 313 F.2d 331 (10th Cir., 1963).

The United States is of the view that Congress made a mistake in enacting subsection (a) because it inadvertently removed the limitation on the applicability of the definition of year, which was clearly apparent in the repealed subsection, ". . . [f]or the purposes of computing the amount of readjustment payment. . .", and substituted in its place, a definition without limitation ". . . [f]or the purposes of this subsection. . .". It purports to find

that mistake not on the face of the statute, but in its legislative history and, on that basis, wants this Court to rewrite the statue to correct it. This the Court must not do.

The United States Court of Appeals for the Eighth Circuit, in *Arkansas Valley Industries* v. *Freeman,* 415 F.2d 713 (8th Cir., 1969), also rejected a similar effort by the United States to resort to legislative history to find a mistake in otherwise clear language and to rewrite the language of a statute to correct it. In *Arkansas Valley,* the United States sought to have included in a statutory definition of "packer", the works "live poultry dealers or hand dealers" in the face of a precise statutory definition which left those words out. The Court quoted from the Agriculture Secretary's judicial officer's opinion which the Court was called upon to review:

> ". . . 'With the prohibitions of Section 202 applicable to live poultry dealers or handlers who are not licensees under Title 5, we cannot believe that Congress intended to make prohibited conduct on the part of live poultry dealers or handlers unlawful without providing a sanction therefor. The failure to specifically amend sections 203 and 204 to include live poultry dealers or handlers appears then as due to oversight or inadvertence.
>
> Under the circumstances then, it is permissible to read into sections 203 and 204 "live poultry handler or dealer". Courts will not hesitate to turn into the sense of some section or provision a qualifying or expanding expression plainly implied by the general context of the act, which has been omitted and which is necessary to prevent a legislative purpose from failing in one of its material aspects.' . . ." 415 F.2d at 716.

The Court reversed the judicial officer and refused to supply what the United States contended was inadver-

tently left out of the definition. Even though Congress had defined packer in other sections of the statute to include these words, and left them out of the section in question without explanation, the Court ruled that the language of the definition in question was clear and that there thus was "no need to resort to general rules of statutory construction." 415 F.2d at 717.

The Court of Appeals, in *DeSoto Securities* v. *Commissioner of Internal Revenue,* 235 F.2d 409 (7th Cir., 1956), rejected a taxpayer's contention that the words "paid or accrued" appearing in Section 505(a) of the Internal Revenue Code really meant only "accrued". The Court there said:

> "Section 505(a) (l) uses the words 'paid or accrued'. The Tax Court's decision has in effect construed the phrase 'paid or accrued' so as to eliminate the word 'paid'. We will not excide 'paid' or any other word which Congress placed in the Act. We shall determine the intention of Congress in conformity with the words it has used and not in the face of those words. The Courts can only interpret congressional acts. They cannot legislate." 235 F.2d at 411.

So also in this case, the Court is being asked to excide the words ". . . [f]or the purposes of the subsection. . ." and to write in their place, the words ". . . [f]or the purposes of computing readjustment pay. . .". O'Meara submits that the Court must reject the United States' position here for it is urging the Court to construe subsection (a) in the face of its clear terms. *DeSoto* accord., *General Electric Co.* v. *Southern Construction Co.,* 383 F.2d 135 (5th Cir., 1967), cert denied 390 US 955 (1967); see also *United States* v. *Sullivan,* 332 U.S. 689 (1948), *Chrestner* v. *Poudere Valley Cooperative Association,* 235 F.2d 946, 950 (10th Cir. 1956).

There can be no question but that the words of subsection (a), ". . . [f]or the purposes of this subsection. . .", apply the definitions which follow it to the entire subsection and not, as the United States contends, to only "computing the amount of readjustment payment. For example subsection (a) (1) of Section 687 is a definition of the word "continuous." According to its terms the word "continuous" includes interruptions in active duty which do not exceed 30 days. And the word "continuous" appears in the subsection's statement of eligibility, ". . . at least five years of *continuous* active duty." To read, the phrase, "for the purposes of this subsection" which proceeds the definition of "continuous" not as it is written but as the United States contends it should be written, i.e., as applying only to the benefits formula, would foreclose application of the definition of "continuous" to the subsection for any purpose, since it only appears in the eligibility statement, not in the benefits formula.

Consequently, as O'Meara contends, the statutory definitions which are contained in subsection (a) clearly and unequivocally apply to the subsection without limitation wherever the words defined are used. That is the way the statute is written, and O'Meara submits, that is the way it should be read by the Court.

a. That Subsection (a) Is A Codification Of Prior Laws Does Not Justify Ignoring Its Clear Terms.

The United States has announced in other cases involving this issue what it describes as a settled principle of statutory construction, that changes in statutory language, even if free of ambiguity, are not to be read as changes at all. It then asserts that that principle is especially

appropriate in this case where the clear change in language serves no purpose. It serves no purpose, the United States argues, because the reading of the statutory definition of "year" into the use of the word "year" in the eligibility statement is circuitous.[7]

The United States misconstrues the law. As early as 1880, this Court was held that the "plain meaning rule" is applicable to statutory revision. *United States* v. *Bowen*, 100 U.S. 508, 513-514 (1880); accord, *Continental Casualty Company* v. *United States*, 314 U.S. 527, 530 (1942). In *Bowen*, the United States sought to read out of a statute the word "such" which was plainly there. It argued that the word "such" changed substantially the predecessor statute and that the declared intent of the statute before the Court was to "revise and consolidate" not to change prior laws. The word "such" it was argued, was written into the statute by mistake.

This Court rejected that argument and followed the clear meaning, "when the meaning is plain, the Courts cannot look to the statutes that have been revised to see if Congress erred in the revision . . ." 100 U.S. at 513-514.

So also this Court declared in *Continental Casualty*, that where the revised form of the statute is clear, it ". . . is to be accepted as correct, notwithstanding a possible discrepancy." 314 U.S. at 530. Thus, a substantial change effectuated in prior law, by revision in the statute before the Court was enforced by the Court even though the change was made without explanation and in the face of the argument that it was inadvertently made.

---

[7] O'Meara responded to that argument earlier in his brief. Suffice it to say that as long as Congress writes its laws clearly the circuity of its draftsmanship must not be used as a device to rewrite what is free of ambiguity.

In a case strikingly similar to the case before the Court here, the United States Court of Appeals, Fifth Circuit, rejected the "settled principle of construction" the United States asserts here. *Barbee* v. *United States,* 392 F.2d 532 (5th Cir., 1968), cert. denied, 88 S. Ct. 1849 (1968). *Barbee* involved a recodification of a section of the federal criminal code. Defendant admitted that the literal reading of the relevant statute prescribed the conduct in which he engaged. However, he argued that the predecessor statute clearly did not prohibit that conduct, and that since the statute before the Court was a mere codification whose only relevant legislative history consisted of the general statement that "changes in phraseology were made", the recodification must be read as working no substantive change and its plain meaning must be discounted.

The Court rejected defendant's argument in *Barbee* and followed the codified section's clear terms.

Like the recodification in *Barbee, Continental Casualty* and *Bowen,* subsection (a) of Section 687 is clear on its face and must be read as it is written. The Court must reject the United States' "settle principle" because at best, it does not appear to be settled. Moreover, the cases on which the Government has in the past relied in support of this proposition do not stand for that proposition at all.

In *United States* v. *Cook,* 384, U.S. 257 (1966), this Court held that the meaning of the word "firm" included businesses conducted by an individual and that the use of the word "firm" in the statute was not intended to eliminate a firm that was run by an individual. Because the prior statute used a word different than "firm", the

appellee argued that the introduction of the word "firm" had in effect eliminated a sole proprietor in business from the statute. The court said:

> "Appellee relies particularly upon the abandonment of the words 'employee of any carrier' and the substitution of the present language of section 660 which does not expressly include the employee of 'any person' or 'any individual' doing business as a common carrier. But the term 'firm' is certainly broad enough in common usage to embrace individuals acting as common carriers; and in those instances where Congress has explicitly indicated its understanding of the term, the definition of 'firm' has included individual proprietorships. (Statutory citations omitted)." 384 U.S. at 260.

The Court then went on to note that there was no plausible reason for drawing the distinction between employees of sole proprietors and employees of partnerships or corporations. The need to regulate the industry was there whether or not the entity was owned by single person, a partnership or a corporation.

The language on which the United States apparently relies is the following:

> "On the other hand, since a large portion of common carriers are individually owned proprietorships, acceptance of appellee's interpretation of §660 would exclude a substantial segment of the industry from the coverage of the act—a result that should not be inferred from the 1949 'changes . . . in phraseology' without some specific indication that Congress receded from the intention it clearly expressed in the 1946 expanding coverage of the act to all carriers. (Reference to Senate Report omitted)." 384 U.S. at 264.

Clearly the Court did not espouse the principle that changes in statutory language resulting from codifications of the law do not ordinarily alter the meaning of the statute, although this is the principle the United States has derived from the case. The Court merely noted that the change in the statute asserted by the appellee would not appear to be a "change in phraseology" which the Senate report apparently indicated was the purpose of the statutory change.

Significantly, if there was such a proposition of statutory construction, the Court would have alluded to it in *Cook*. The fact that it did not indicates that there is no such proposition. Earlier in its opinion the court said:

> "There is no doubt that the 1946 statute covered employees of individuals and in our view it was not intended by adopting the 1948 revision of the code to make any substantive change of the law by excluding from its coverage the employees of any class of carrier who had been previously covered. The general purpose of the code was to 'codify and revise. . .'. The original intent of Congress is preserved (reference to the quotation in the Senate report omitted), and with respect to the new §660, the revisors, while noting the consolidation of a portion of §409 and §412 and stating that '(c)hanges were made in phraseology', disclosed no intention of making any change in the substantive content or the coverage of the law. See Legislative History note following 18 U.S.C. §660 (1964 ed.). To us the Congressional intent to reach the employees of any carrier, whatever form of business organization, seems reasonably clear." 384 U.S. at 260.

Again, in the foregoing language of the Court in *Cook*, there can be found no principle that codification ordinarily does not result in substantive change of the law. Each

codification is studied for ambiguity. And if it is found, then resort is had to legislative history. However, the Court applies no such rule of construction as the United States may advance, i.e., that codification is presumptively to effect no change in the statute.

Significant, also, the interpretation of the word "firm" by the Court in *Cook* is obviously sound. There is no exclusion of an individual enterprise from the meaning of the word "firm". The codification which occurred in the Cook case, therefore, is clearly just a difference in phraseology as the Senate report indicated. There was no change at all in Cook like the change that was made in subsection (a) before this Court. Here there is not merely a change in a word which had the same meaning as the word which was previously used. Rather, there is a complete change in terminology.

In *Ohio Bank and Savings* v. *Tri-County National Bank*, 411 F.2d 801 (6th Cir. 1969) which the United States has also in the past cited for the proposition that a codification does not ordinarily change the substance of the statute, likewise contains no such declaration by the Court. Again, this is purely the United States own "principle" of the case. The Court said:

> "Actually before the recodification of the Ohio code in 1953, the General Code section on branch banking read 'in other parts of the county or counties in which the municipal corporation containing the main bank is located'. The legislature deleted the words 'or counties' in the recodification, but a reading of Section 1.10(C) ORC (supra) with Section 1.24 ORC makes it clear that a substantive change was not intended. The latter section unequivocally states that no change in the law was intended by the recodification:

> 'in enacting this act it is the intent of the general assembly not to change the law as heretofore expressed by this section or sections of the general code in effect on the date of enactment of this act. The provisions of the Revised Code relating to the corresponding section or sections of the General Code shall be construed as restatements of and substituted in a continuing way for applicable existing statutory provisions, and not as new enactments.'" 411 F.2d at 803-804.

Clearly, with the statutory provision like that quoted above there is no need for, and the Court clearly did not announce, a principle that mere codifications do not ordinarily effect substantive changes in the law. If there is such a principle of statutory construction, there would be no need for the statutory statement quoted above with respect to the Ohio statute in question. Neither would the Court have to resort to such a statement of legislative intent if such a rule of statutory construction exists.

Significantly, the foregoing language of the statute is contained *in the statute*. It is not to be found in legislative history. Thus, the Court did not even resort to legislative history, and clearly had no need to resort to rules of statutory construction let alone the rule of statutory construction which the United States has announced is the principle of this case.

The United States has in the past intimated that effecuation of the "plain meaning" of subsection (a) would yield a "bizarre result"—and that in this case obvious policy considerations override the structures of the "plain meaning rule". In advancing this contention, the United States has placed primary reliance upon the language found in *Lynch* v. *Overholsen*, 369 U.S. 705, 710 (1962):

"The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of the statute . . . for 'literalness may strangle meaning.'" That case involved interpretation and application of §24-301(d) of the D. C. Code, which provided in pertinent part:

> "If any person tried upon an indictment or information for an offense . . . is acquitted solely on the ground that he was insane at the time of its commission, the Court shall order such person confined in a hospital for the mentally ill."

Petitioner, in *Lynch*, had *not* affirmatively relied upon the defense of insanity; nevertheless, the trial court judge refused a proffered guilty plea, found petitioner not guilty by reason of insanity, and committed him to a "hospital for the mentally ill" pursuant to §24-301(d). In ordering petitioner's release, this Court indulged, *inter alia*, in the language above quoted. Critical to its decision was the Court's sensitivity to the "rule" that a statute "should be interpreted, if fairly possible in such a way as to free it from not insubstantial constitutional doubts." 369 U.S. at 711. And the use made of it by the trial court judge clearly raised grave due process problems. Further, the proposition for which the United States has previously cited *Lynch*—that "resort to legislative history is particularly appropriate in order to avoid a bizarre result—*such as turning a codification into a substantive amendment*"—is not even remotely suggested by the case itself. Moreover, the reading of subsection (a) of Section 687 suggested by the petitioners here patently does not issue a "bizarre result". Its manifest purpose is to provide a compensation increment to those who had

served a substantial period of "active duty." The issue raised by this case leaves untouched this basic and *overriding* element of Congressional intent. The teaching provided by the second case often cited by the United States, *United States* v. *Bryan*, 339 U.S. 323, 338 (1950) (where the Supreme Court rejected a construction of a statute which was "contrary to the congressional intent and leads to absurd conclusions"), is likewise similarly inapposite.

It should also be noted that other cases in which literalism is disapproved almost invariably involve a relevant ambiguity. See, e.g., *United States* v. *Anaconda Wire and Cable Company*, 342 F. Supp. 1116 (S.D.N.Y. 1972). In that case it was found that the critical "language punctuated as it is, notably ambiguous." 342 F. Supp. at 1119. Such a finding renders subsequent language disapproving "a cramped construction blindly applying the language of the statute to an unanticipated situation" mere surplusage—as well as misleading.

Once again, O'Meara asserts that subsection (a) is free from ambiguity. Given that, any principle, settled or otherwise, that codification does not effect substantive change, must yield to the subsection's clear terms.

4. Assuming, Arguendo Only, That Subsection (a) Is Ambiguous, Its Legislative History Does Not Solve That Ambiguity To The Extent That The Apparent Meaning Of The Subsection's Terms Should be Disregarded.

O'Meara submits that subsection (a) is free of ambiguity, that its clear definition of "year" must be read into the use of that word in its eligibility statement, and that the Court must not resort to legislative history to

create an ambiguity or find a mistake and then rewrite the subsection to correct it. Yet for argument purposes only, O'Meara will discuss legislative history to illustrate that it does not solve any ambiguity and that it does not indicate a mistake was made.

a. Subsection (a) And Its Predecessors.

The United States always, and accurately, points out that the predecessor to subsection (a) clearly limited the application of the definition of "year" to the subsection for only *one* purpose, "computation of readjustment benefits." In the present subsection (a), the definition applies to the subsection without limitation. This comparison of statutory language is compelling evidence that Congress intended the change it plainly made, not, as the United States argues, that it meant no change in phraseology. Thus, O'Meara submits, this legislative historical fact supports petitioners' position.

b. The Senate Report Accompanying What Is Now Subsection (a) Of Section 687.

The Senate report accompanying the bill which included what is now subsection (a) states generally that the bill is not intended to make any substantive change, rather that it is a codification of prior laws. Moreover, the report makes no mention in its list of statutory changes, of the change in what is now subsection (a) which removed the limitation of the subsection's definition of years.

However, these legislative facts can hardly be said to overcome the plain change which was obviously intended when the comparison is made between the *statutory language* of the repealed law and the present subsection (a).

Moreover, as the Court in *Schmid* observed, the original subsection actually used the language of the present subsection (a) but changed it to" . . . (f)or the purposes of computing readjustment payment" because the Comptroller General pointed out tha tthe definition of year should apply *only* for computation of benefits, not for any other purpose. 436 F.2d 987. Thus, the restoration by Congress in the present subsection of language which it had already been advised would make the definition of "year" apply to the use of that word in the subsection's eligibility statement is additional evidence that Congress meant to write what it actually wrote. But at the very least, it is, O'Meara submits, sufficient to place substantial doubt on the omniscience of the author of the Senate report.

The United States purports to find further legislative historical support for its contention from the lack of legislative hearings or even inquiries on the question whether the eligibility period should be reduced. It then has represented that such a reduction in the eligibility period would substantially increase the United States' liability, and then refers to a fact *not in the record,* that the increase in liability approximates $12,000,000.00.

O'Meara submits that this lack of hearings has only minor significance, and then only if there was a proven need for the hearings. Certainly, hearings were in order when Congress first enacted the bill in 1956 because the benefits had never before existed and the creation of them surely would have "substantial" impact on the United States' liability for benefits. Also, when the formula for computing benefits was changed from "one-half a month's basic pay" to "two months' basic pay" there may have been arguable need for hearings. But where the eligibi-

lity period is reduced by six months, there hardly appears to be any substantial impact in United States' liability. All it would have to do to avoid liability is to release its armed forces reservists from active duty before they satisfy the eligibility period, just as it attempted to avoid liability in O'Meara's case by releasing him thirteen days short of his five years of active duty. The only reason the United States could possibly be exposed to a liability is because it did not adhere to the plain meaning of the 1962 change in language of section (a), and did not interpret the subsection as it was written. Liability is purely under the control of the United States. It can either release the men before eligibility, or it can incur the liability.

No doubt this is the explanation why Congress held no hearings to consider the issue of liability created by the 1962 change in language. O'Meara therefore submits that the lack of hearings cannot be of such significance to solve the purported ambiguity.

c. Administrative Interpretation Of Subsection (a).

Finally, the United States resorts to the self serving indicia of administrative interpretation. O'Meara submits that the interpretation of those who are attempting to avoid the language change must be considered so far removed in terms of probity as to carry little if any weight. Significantly, the Marine Corps order 1900. 1 H(7) provides that the readjustment payment only applies to reserve offices; whereas, the statute makes no distinction between officers or enlisted men.

To claim, as the United States evidently does, that current administrative practice *is* the one mandated by

subsection (a) because it is the one followed by those agencies charged with its effectuation makes garden variety "bootstrapping" appear sophomoric by comparison. The case previously relied upon by the United States in support of its contention that relevant administrative practice "should be followed unless there are compelling indications that it is wrong", *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 381 (1969), is inapposite for purposes of this case. *Red Lion* involved a challenge of a regulatory structure—consisting of a substantive and procedural agency which made rules under the following circumstances: broad statutory authorization—in the form of (i) *general* statutory language and (ii) express rule-making authority; a regulatory scheme which had continued in force and substantially unchanged for over 30 years—thereby giving Congress ample opportunity to "speak out" had it felt that such scheme conflicted with the terms of the relevant statute. The case before this Court, by way of comparison, offers the following: a very specific provision which leaves no room for agency discretion; a regulatory scheme marked by a considerable degree of flux; additionally, there is no readily apparent reason why the change worked by the 1962 revision would have come to the responsible agencies' attention prior to institution of the recent relevant litigation.

With respect to the propriety of *not* deferring to relevant administrative interpretation, the principle that resolution of what a statute *means* is primarily the *independent* function of the courts is plentiful. See, *e.g.*, *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944): "Undoubtedly questions of statutory interpretation . . . are for the courts to resolve . . . ." 322 U.S. at 130-131.

Finally, there *are* "compelling indications that (the responsible agencies) are wrong": *i.e.*, the clear and unambiguous terms of subsection (a) itself.

In sum, then O'Meara submits that, even if there is an ambiguity, arguendo only, and there is none, the legislative history is not clear in its support of the position of the United States. Rather, the legislative history indicates support more for petitioners' contention that Congress intended the change it made. But at the very best it is clearly capable of conflicting interpretations, and, therefore, does not solve, but creates an ambiguity. As such it must be disregarded in favor of the subsection's clear meaning. *United States* v. *Shreveport Grain Elevator*, 287 U.S. 77 (1932) O'Meara submits that the Court must reject the United States' search for ambiguity or inadvertance in history, and read subsection (a) the way Congress plainly wrote it.

5. The Decision Of The Court Of Appeals In Cass Must Be Reversed And The Decisions Of The District Courts Affirmed.

As O'Meara pointed out early in this brief, the reported and unreported decisions on this precise issue number at least eleven (11). All these decisions, save one, have reasoned that subsection (a) is free of ambiguity in its mandate that the definition of "year" is to be read into the use of that word in the subsection's eligibility statement. Only the Court of Appeals in *Cass*, has reasoned to the contrary. O'Meara respectfully submits that the decision of the Court of Appeals in *Cass* must be reversed and the District Courts affirmed.

The essential point upon which O'Meara contends that the Court of Appeals decision in *Cass* should not be fol-

lowed is that the Court finds ambiguity in subsection (a) where, O'Meara submits, there is none. It purportedly finds ambiguity in the circuitous, but clear, language of the subsection which requires that the definition of "year" be read into the use of that word in the eligibility statement. That, O'Meara submits, does not create the ambiguity necessary as a predicate to resorting to legislative history. The phrase, "For the purposes of this subsection", clearly refers to the entire subsection (a) of Section 687 which includes *both* the five year eligibility requirement and the formula for computing the statutory benefits. The clarity of the subsection's terms cannot be made ambiguous solely by, what a Court believes, is circuitous, albeit clear, draftsmanship. It is certainly no more circuitous than reading the subsection's definition of "continuous" into the use of that word in the eligibility statement.

And without ambiguity on the face of the subsection, the Court must not resort to history to find it. It is not the function of courts to utilize legislative history to rewrite an other wise clear and precise statute, O'Meara submits the clear terms of the statute must prevail, and that they do not prevail in the decision of the Court of Appeals in *Cass*.

CONCLUSION

For the above reasons, John N. O'Meara respectfully urges this Court to reverse the Court of Appeals in *Cass* and to affirm the District Courts.

Respectfully submitted,

KEVIN M. FORDE, LTD.
111 W. Washington Street
Chicago Illinois 60602

ROGER J. KILEY, JR., LTD.
EDWARD T. JOYCE, LTD.
77 West Washington Street
Chicago, Illinois 60602
Attorney for Amicus Curiae

Certificate of Service

I, Kevin M. Forde, attorney for amicus, hereby certify that three copies of this brief were duly served upon attorneys for all parties by mail service, postage prepaid.

Kevin M. Forde, Ltd.

ADDENDUM

687. *Non-regulars—Readjustment Payment upon involuntary release from active duty.* (a) Except for members covered by subsection (b), a member of a reserve component or a member of the Army or the Air Force without component who is released from active duty involuntarily or because he was not accepted for an additional tour of active duty for which he volunteered after he had completed a tour of active duty, and who has completed, immediately before his release, at least five years of continuous active duty as a commissioned officer, warrant officer, or enlisted member, is entitled to a readjustment payment computed by multiplying his years of active service, but not more than 18, by one-half of one month's basic pay of the grade in which he is serving at the time of his release. For the purposes of this subsection—

(1) a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days;

(2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded; and

(3) a period for which the member concerned has received severance pay under another provision of law may not be included.